# Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(M)-182–05 OF 2014
ROHANA YUSUF, TENGKU MAIMUN AND ABANG ISKANDAR JJCA
28 OCTOBER 2014

*Civil Procedure — Declaration — Application for — Judicial review — Constitutional rights to use word 'Allah' in religious publication — Certiorari and mandamus — Order for — Withdrawal of prayers — Whether affected declaratory relief sought — Whether declaration may be granted even if it was not prayed for jointly or in alternative with other remedies — Whether application for order of declaration appropriate — Whether necessary to go into merits of case at leave stage — Whether there was arguable case — Whether application frivolous — Whether leave to be granted — Rules of the High Court 1980 O 15 r 16 & O 53 r 2(2)*

The second appellant was a church while the first appellant was the church's president. The appellants had brought in seven titles of religious Indonesian publications comprising Sunday School materials for the members of the church. The materials contained the use of the word 'Allah'. causing them to be detained by the customs officer. The Ministry of Internal Security ('the Minister') stipulated that '... Kerajaan telah memutuskan penggunaan istilah atau perkataan Allah, Kaabah, Baitullah dan Solat hanya khusus untuk digunakan di dalam mana-mana bahan penerbitan/cetak berkaitan agama Islam dan tidak boleh digunakan di dalam penerbitan agama lain'. The appellants proceeded to file an application in the High Court for leave to apply for judicial review and sought for: (i) a certiorari order to quash the decision of the Minister to refuse the importation and to withhold delivery of the publications; (ii) a mandamus order to direct the Minister to return the publications to the appellants; and (iii) for several declarations, which essentially concerned the appellants' and/or their congregations' Constitutional right to use the word 'Allah' in the Bahasa Malaysia and/or Bahasa Indonesia translations of the Bible as well as in all religious publications and materials ('all other publications'). In January 2008, the detained publications were released to the appellants. Consequently, the reliefs for certiorari and mandamus were accordingly withdrawn. Following the Court of Appeal's decision in ('the *Herald*'s case') which decided that the word 'Allah' was not an integral part of the faith and practice of Christianity, the High Court dismissed the appellants' application for leave. Hence, this appeal. The appellants argued that based on the majority judgment of the Federal Court in

the *Herald*'s case, the High Court was no longer bound by the Court of Appeal's decision in that case. The respondents submitted, inter alia, that the relief of declaration sought on all other publications concerned the appellants' future rights which ought not to be granted; and based on O 53 r 2(2) of the Rules of the High Court 1980 ('the RHC'), declaratory relief could not be sought on its own in an application for judicial review. The appellants should have sought the declaratory relief under O 15 r 16 of the RHC.

**Held**, allowing the appeal with no order as to costs:

(1) Although the appellants withdrew the prayers for an order for certiorari and mandamus, there were other prayers in relation to all other publications which had not been withdrawn. Hence, notwithstanding the withdrawal of the first part of the application, the second part which was premised on the respondent's decision to prohibit the use of the word 'Allah' in all other publications remained in dispute and the issues contained in the prayers for declaration was still alive (see para 11).

(2) The finding of the Court of Appeal in the *Herald*'s case that the word 'Allah' was not an integral part of the Christianity faith had been ruled as a mere obiter by the Federal Court. The application before the High Court judge concerned a church in Sabah where native bumiputra Christians had been using the word 'Allah' for many generations in all aspects of the profession and practice of their Christian faith. In addition to that, there was non-existent in Sabah any state law enacted under art 11(4) of the Federal Constitution which prohibits the use of the word 'Allah' as opposed to nine other states which had enacted state laws on the prohibition (see para 13).

(3) The appellants had properly sought the relief of declaration in their application for judicial review. The fact that the prayers for an order for certiorari and mandamus were withdrawn did not affect the application. In appropriate cases, declaration may be granted by the court even if it was not prayed for jointly or in the alternative with other remedies. This appeal was in respect of an application for leave for judicial review where the threshold was very low. It was not necessary to go into the merits of the case at the leave stage. The test was to see whether the appellants had an arguable case and that the application was not frivolous. The appellants had passed the threshold for leave to be granted (see paras 16 & 22).

**[Bahasa Malaysia summary**

Perayu kedua adalah sebuah gereja manakala perayu pertama adalah presiden gereja itu. Perayu-perayu telah memperkenalkan tujuh tajuk penerbitan berunsur agama Indonesia yang terdiri daripada bahan Sunday school untuk ahli-ahli gereja itu. Bahan-bahan itu mengandungi penggunaan perkataan

A 'Allah', yang menyebabkan mereka ditahan oleh pegawai kastam. Kementerian Keselamatan Dalam Negeri ('Menteri') telah menetapkan bahawa '... Kerajaan telah memutuskan penggunaan istilah atau perkataan Allah, Kaabah, Baitullah dan Solat hanya khusus untuk digunakan di dalam mana-mana bahan penerbitan/cetak berkaitan agama Islam dan tidak boleh digunakan di dalam
B penerbitan agama lain'. Perayu-perayu telah meneruskan dengan pemfailan permohonan di Mahkamah Tinggi untuk kebenaran semakan kehakiman dan memohon untuk: (i) satu perintah certiorari bagi membatalkan keputusan Menteri untuk menolak pengimportan dan menahan penghantaran penerbitan itu; (ii) satu perintah mandamus mengarahkan Menteri
C memulangkan penerbitan-penerbitan itu kepada perayu-perayu; dan (iii) untuk beberapa deklarasi, yang pada dasarnya berkenaan hak Perlembagaan perayu-perayu dan jemaah mereka untuk menggunakan perkataan 'Allah' dalam terjemahan Bahasa Malaysia dan/atau Bahasa Indonesia untuk Injil itu dan juga dalam semua penerbitan dan bahan semua agama ('semua
D penerbitan-penerbitan lain'). Pada Januari 2008, penerbitan-penerbitan yang ditahan itu telah dilepaskan kepada perayu-perayu. Seterusnya, relief-relief untuk certiorari dan mandamus telah ditarik balik. Berikutan keputusan Mahkamah Rayuan di mana ('kes *Herald*') telah diputuskan bahawa perkataan 'Allah' tidak merupakan bahagian penting dalam agama dan amalan Kristian,
E Mahkamah Tinggi menolak permohonan untuk kebenaran perayu-perayu. Justeru, rayuan ini. Perayu-perayu berhujah bahawa berdasarkan penghakiman majoriti Mahkamah Persekutuan dalam kes *Herald*, Mahkamah Tinggi tidak lagi terikat dengan keputusan Mahkamah Rayuan dalam kes tersebut. Responden-responden berhujah, antara lain, bahawa relief deklarasi dipohon
F untuk semua penerbitan lain berkenaan hak-hak masa depan perayu-perayu yang tidak patut diberikan; dan berdasarkan A 53 k 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), relief deklarasi tidak patut dipohon dengan sendirinya dalam permohonan untuk semakan kehakiman. Perayu-peryau patut memohon relief deklarasi di bawah A 15 k 16 KMT.

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**Diputuskan**, membenarkan rayuan tanpa perintah kepada kos:

(1) Walaupun perayu-perayu menarik balik permohonan bagi perintah untuk certiorari dan mandamus, terdapat permohonan lain berkaitan
H semua penerbitan lain yang tidak ditarik balik. Justeru, walaupun terdapat penarikan balik bahagian pertama permohonan, bahagian kedua yang berasaskan keputusan responden untuk melarang penggunaan perkataan 'Allah' dalam semua penerbitan lain masih dipertikaikan dan isu-isu yang terkandung dalam permohonan untuk
I deklarasi masih wujud (lihat perenggan 11).

(2) Penemuan Mahkamah Rayuan dalam kes *Herald* bahawa perkataan 'Allah' bukan bahagian penting dalam agama Kristian telah diputuskan sebagai obiter sahaja oleh Mahkamah Persekutuan. Permohonan di hadapan hakim Mahkamah Tinggi berkenaan sebuah gereja di Sabah di

mana anak negeri bumiputra Kristian telah menggunakan perkataan 'Allah' untuk bergenerasi lamanya dalam semua aspek penganutan dan amalan agama Kristian mereka. Tambahan pula, di Sabah tidak wujud apa-apa undang-undang negeri yang digubal di bawah perkara 11(4) Perlembagaan Persekutuan yang melarang penggunaan perkataan 'Allah' berbanding dengan sembilan negeri lain yang mempunyai penggubalan undang-undang negeri berhubung larangan itu (lihat perenggan 13).

(3) Perayu-perayu telah sewajarnya memohon relief deklarasi dalam permohonan mereka untuk semakan kehakiman. Fakta yang permohonan bagi perintah untuk certiorari dan mandamus ditarik balik tidak menjejaskan permohonan itu. Dalam kes-kes yang sesuai, deklarasi boleh diberikan oleh mahkamah walaupun ia tidak dipohon bersesama atau secara alternatif dengan remedi lain. Rayuan ini adalah berkaitan permohonan bagi kebenaran untuk semakan kehakiman di mana ambangnya amat rendah. Adalah tidak perlu untuk melihat merit kes di peringkat kebenaran. Ujiannya adalah untuk melihat sama ada perayu-perayu mempunyai kes yang boleh dihujah dan bahawa permohonan itu tidak remeh. Perayu-perayu telah lulus ambang untuk kebenaran diberikan (lihat perenggan 16 & 22).]

**Notes**

For cases on application for declaration, see 2(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2778–2817.

**Cases referred to**

*Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (not folld)

*Datuk Syed Kechik bin Syed Mohamed & Anor v Government of Malaysia* [1979] 2 MLJ 101, FC (folld)

*Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149, FC (refd)

*Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468; [2013] 8 CLJ 890, CA (refd)

*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413, CA (refd)

*Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)

*Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765; [2014] 6 CLJ 541, FC (refd)

**Legislation referred to**

Federal Constitution art 11(4)
Immigration Act 1959/63
Rules of the High Court 1980 O 15 r 16, O 53, O 53 r 2(2), (4)
Trustees Incorporation Ordinance (Sabah Cap 148)

**Appeal from:** Application for Judicial Review No R2–25–407 of 2007 (High Court, Kuala Lumpur)

*Lim Heng Seng (Bobby Chew with him) (Chris Koh & Chew) for the appellants.*
*Shamsul bin Bolhassan (Munahyza bt Mustapha with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.*

**Tengku Maimun JCA (delivering judgment of the court):**

**[1]** The factual matrix of this appeal is as follows. The second appellant is a church incorporated under the Trustees Incorporation Ordinance (Sabah Cap 148) while the first appellant is the president of the church.

**[2]** For the religious education of the children of the members of the church, the appellants brought in seven titles of publications from Indonesia. The publications which consist of Sunday School materials were detained by the customs officer.

**[3]** The first appellant's request and appeal for the return of the publications were denied. In a letter dated 24 October 2007 ('the said letter'), the Ministry of Internal Security explained the basis of the decision as follows (pp 134–136: *rekod rayuan Jld* 2):

> 2. Kementerian telah meneliti surat tuan berkenaan penahanan buku bagi pendidikan kanak-kanak Kristian yang diimport dari Bandung Indonesia yang kemudiannya telah ditahan oleh Kementerian di lapangan terbang LCCT pada 15 Ogos 2007.
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> 3. Kementerian juga mendapati seperti mana di dalam perenggan 4 dan 5 pihak tuan telah membangkitkan beberapa perkara iaitu mengenai kebebasan beragama menurut Artikel 11 Perlembagaan Negara dan kenyataan YAB Menteri Keselamatan Dalam Negeri mengenai Alkitab yang mengandungi perkataan 'Allah' dibenarkan digunapakai di gereja-gereja di Malaysia. ...
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> 3. Perkara 3(1) Perlembagaan Persekutuan, ada menyebut bahawa Agama Islam adalah agama rasmi Persekutuan. Sungguhpun demikian, agama lain boleh diamalkan dengan aman dan damai di mana-mana bahagian Persekutuan. Selanjutnya Perkara 11(1)(3)(a) Perlembagaan Persekutuan menyebut, setiap orang berhak menganuti dan mengamalkan agamanya dan, tertakluk kepada Fasal (4), mengembangkannya, di samping berhak menguruskan hal ehwal agamanya sendiri. Fasal 4, Perkara 11, Perlembagaan Persekutuan tersebut ialah:
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> > Undang-undang Negeri, dan berkenaan dengan Wilayah-Wilayah Persekutuan Kuala Lumpur, Wilayah Persekutuan Labuan dan Putrajaya, undang-undang Persekutuan boleh mengawal atau menyekat pengembangan apa-apa doktrin atau kepercayaan agama di kalangan orang yang mengamal agama Islam.
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> 4. Bersesuaian dengan itu, terdapat negeri-negeri yang mewujudkan undang-undang / enakmen negeri masing-masing bagi mengawal pengembangan

agama di kalangan orang Islam dengan masing-masing meluluskan perkataan / istilah agama Islam yang dilarang digunakan di dalam bahan penerbitan agama lain selain daripada agama Islam.

...

7. ... pada 2 Disember 1981 Kerajaan telah mewartakan larangan terhadap Alkitab di Malaysia melalui Warta Kerajaan P.U.(A) 15/82 di bawah Seksyen 22 Akta Keselamatan Dalam Negeri. Setelah mengambil kira rayuan badan-badan agama Kristian ketika itu, Kerajaan telah memberikan pengecualian khas melalui Warta Kerajaan P.U.(A) 134 bertarikh 13 Mei 1982 bahawa pemilikan penerbitan atau penggunaan Al-Kitab adalah hanya dibenarkan di dalam gereja oleh orang-orang yang beragama Kristian di seluruh Malaysia.

8. Dalam pada itu, perbezaan perkataan dan jumlah perkataan di dalam undang-undang negeri terus menimbulkan kekeliruan dan kegelisahan di kalangan masyarakat apabila pelaksanaan penguatkuasaan terhadap penggunaan istilah / perkataan di dalam penerbitan agama lain tidak dijalankan secara berkesan. Sehubungan itu, Kerajaan telah membuat keputusan pada 19 Mei 1986 bahawa daripada keseluruhan 16 perkataan larangan, menetapkan empat perkataan iaitu *Allah, Kaabah, Solat* dan *Baitullah* adalah merupakan istilah / perkataan khusus agama Islam yang tidak boleh diguna pakai dalam bahan penerbitan agama lain kecuali bagi menerangkan konsep-konsep berkaitan dengan agama Islam. Berikutan itu Kementerian telah mengeluarkan surat pemberitahuan keputusan Bil KKDN S.59/3/6/A Klt 2 bertarikh 5 Disember 1986 kepada penerbit-penerbit agama Kristian bagi mematuhi keputusan itu.

9. Kesimpulannya, Kerajaan telah memutuskan penggunaan istilah atau perkataan Allah, Kaabah, Baitullah dan Solat hanya khusus untuk digunakan di dalam mana-mana bahan penerbitan / cetak berkaitan agama Islam dan tidak boleh digunakan di dalam penerbitan agama lain.

10. Walau bagaimanapun, pihak Kerajaan juga membenarkan penerbitan bertajuk *Alkitab* digunakan oleh semua penganut agama Kristian di Negara ini di dalam gereja-geraja sahaja dan TIDAK di tempat-tempat lain. Kebenaran ini tidak meliputi lain-lain penerbitan agama Kristian selain daripada Bible berbahasa Melayu iaitu *Alkitab*.

12. Melalui penjelasan ini, adalah diharapkan agar pihak tuan dapat memahami isu larangan penggunaan empat perkataan khusus ini. Perlu diingat semua penerbitan agama lain sama ada yang diimport atau yang diterbitkan di dalam Malaysia yang mengandungi mana-mana istilah khusus agama Islam adalah dilarang diedarkan di dalam Malaysia. Oleh yang demikian pihak tuan hendaklah melaksanakan keputusan tolak pengimportan / tahan penghantarserahan ke atas penerbitan-penerbitan berkenaan. (Emphasis added.)

**[4]** On 10 December 2007, the appellants filed an application in the High Court at Kuala Lumpur for leave to apply for judicial review, seeking for the following reliefs:

(a) an order for certiorari to quash the decision of the Minister of Internal Security to refuse the importation and to withhold delivery of the publications;

(b) an order for mandamus to direct the Minister to return the publications to the appellants; and

(c) for several declarations, which essentially concern the appellants' and/or their congregations' constitutional right to use the word 'Allah' in the *Bahasa* Malaysia and/or *Bahasa* Indonesia translations of the Bible as well as in all religious publications and materials (all other publications).

**[5]** Sometime in January 2008, the publications that were detained were released to the appellants. The application in respect of the reliefs for certiorari and mandamus was accordingly withdrawn by the appellants.

**[6]** In the High Court, the learned senior federal counsel ('the SFC') objected to the application for leave on the following grounds:

(a) since the publications have been released, there is no decision to be impugned within the ambit of O 53 r 2(4) of the Rules of the High Court ('the RHC') 1980;

(b) since the publications have been released, the subject matter of the judicial review is now rendered academic; and

(c) as the prayers for certiorari and mandamus have been withdrawn, there is nothing for the prayers for declaration to stand with, either jointly or alternatively, as required under O 53 r 2(2) of the Rules of the High Court 1980 ('the RHC').

**[7]** In a five-paragraph judgment, the learned High Court judge dismissed the application for leave. For ease of reference, we reproduce below the judgment of the learned judge:

> This is an application by the applicants for leave to commence judicial review against the respondents. I have scrutinised the cause papers and submissions made by the parties.
>
> [2] There were 22 reliefs sought by the applicants in this application. However, the applicants have withdrawn reliefs pertaining to the publications listed in prayer (a) of encl 1. The only issue that is still alive as contained in the 13 declarations sought by the applicants pertains to the use of the word 'Allah' on all other publications.
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> [3] On the use of the word 'Allah', I have no choice but to refer to the decision of the Court of Appeal in the case of *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468; [2013] 8 CLJ 890. Although that decision was pertaining to the Herald publication, all the three learned Court of Appeal judges have held that the word 'Allah' is not an integral part of the faith and

practice of Christianity and therefore the prohibition by the minister is not unconstitutional.

[4] Hence, as long as that decision stands (the appeal in the Federal Court is still pending), applying the doctrine of stare decisis, this court is bound by that decision, being the decision of the more superior court.

[5] Based on that, I am of the view there is no serious issue to be tried; hence this application for leave is therefore dismissed with no order as to costs.

**[8]** Against the decision of the High Court, the appellants appealed to the Court of Appeal. Before us, learned counsel for the appellants submitted that:

(a) the application for judicial review consists of two parts. While the first part of the application which was withdrawn relates to the Sunday School Publications, the second part which relates to all other publications is still pertinent;

(b) in the light of the majority judgment of the Federal Court in *Herald*'s case, the High Court is no longer bound by the decision of the Court of Appeal in the said case;

(c) relying on *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413 and *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865, it is perfectly in order for the applicant in a judicial review application to seek relief for declarations only;

(d) the appellants have every right to seek declarations with regard to the decision on all other publications over which there is a cloud of anxiety and uncertainty hanging over their heads. The case of *Datuk Syed Kechik bin Syed Mohamed & Anor v Government of Malaysia* [1979] 2 MLJ 101 was cited in support thereof; and

(e) the role of the High Court at the leave application stage is only to see if the application for leave discloses an arguable case and is not frivolous.

**[9]** In response, the learned SFC repeated the objections advanced in the High Court. It was further submitted by the learned SFC that the relief of declaration sought on all other publications concerns the appellants' future rights which ought not to be granted.

## OUR DECISION

**[10]** We agree with learned counsel for the appellant that the application for judicial review before the learned High Court judge consists of two parts. The first part relates to the prohibition on the publications that were detained by

the respondents which had eventually been released, while the second part relates to the general prohibition on all other publications. The second part of the application is founded on para 12 of the said letter of the Ministry which reads:

> Perlu diingat semua penerbitan lain sama ada yang diimport atau yang diterbitkan di dalam Malaysia yang mengandungi mana-mana istilah khusus agama Islam adalah dilarang diedarkan di dalam Malaysia.

**[11]** As stated by the learned trial judge, the appellants prayed for 22 reliefs in the judicial review application. Following the release of the publications by the respondents, the appellants withdrew two of the prayers, namely the prayers for an order for certiorari and mandamus. There are other prayers in relation to all other publications which had not been withdrawn by the appellants. Hence, notwithstanding the withdrawal of the first part of the application, the second part of the application which was premised on the respondent's decision to prohibit the use of the word 'Allah' in all other publications remain in dispute. We therefore agree with the learned High Court judge that the issue contained in the prayers for declarations which pertain to the use of the word 'Allah' in all other publications is still alive. We note that there was no cross-appeal by the respondents on the ruling of the High Court that the issue of declaration sought by the appellants is still alive. The submission of the learned SFC that the application for leave for judicial review has been rendered academic and is an exercise in futility is thus devoid of merit.

**[12]** In not granting leave to the appellants, the High Court had relied on only one ground, namely that it held itself bound by the Court of Appeal's decision in the *Herald*'s case. In *Herald*'s case, the Court of Appeal had stated that the word 'Allah' is not the essential or integral part of the religion of Christianity (see *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468; [2013] 8 CLJ 890 at pp 495–497 and 521, at pp 932–933 and 963).

**[13]** The finding of the Court of Appeal that the word 'Allah' is not an integral part of the faith of Christianity had been ruled as a mere obiter by the Federal Court (see *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765 at p 808; [2014] 6 CLJ 541 at p 584). In the circumstances, we find that the basis for the decision of the learned High Court judge is no longer sustainable (see *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149). In any event, as submitted by learned counsel for the appellants, the application before the learned High Court judge concerns a church in Sabah where native bumiputra Christians have been using the word 'Allah' for many generations in all aspects of the profession and practice of their Christian faith. Further, there is non-existent in Sabah, any

state law enacted under art 11(4) of the Federal Constitution to prohibit the use of the word 'Allah' as opposed to nine other states which had enacted state laws on the prohibition.

**[14]** On whether the appellants, having withdrawn the reliefs for certiorari and mandamus are barred from seeking declaration, the learned SFC relied on O 53 r 2(2) of the RHC which provides:

> An application for judicial review may seek any of the said reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or in connection with the same subject matter.

**[15]** It was submitted by the learned SFC that in the light of O 53 r 2(2) of the RHC, declaratory relief cannot be sought on its own in an application for judicial review.

**[16]** We find that the appellants had properly sought for the relief of declaration in their application for judicial review. The application for declaration was made jointly with the application for certiorari and mandamus. The fact that the prayers for an order for certiorari and mandamus were withdrawn does not affect the application. In any event, declaration may be granted by the court in appropriate cases even if it was not prayed for jointly or in the alternative with other remedies as decided by this court in the case of *Sivarasa Rasiah*, at p 420:

> To return to the construction to be given to O 53 of the RHC, I turn to the second point I wish to make. It is the principle which governs the construction of rules of court. A rule of court should not be interpreted in such a way as to result in unfairness or produce a manifest injustice: *Bank of America National Trust and Savings Associations v Chai Yen* [1980] 1 MLJ 198; *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara* [1995] 1 MLJ 292. So here, a manifest injustice would occur if O 53 of the RHC is read restrictively so as to permit an applicant to claim a declaration only where he applies for it jointly with some other remedy.
>
> I might add that under para 1 of the Schedule to the CJA, which is drawn from art 226 of the Indian Constitution and to which in material parts it is identical, our courts have power to issue such orders and grant such relief as is appropriate to the particular circumstances of a given case. Support for this view may be found in the decision of the Indian Supreme Court in *Dwarka Nath v Income Tax Officer* AIR 1966 SC 81 ....

**[17]** Further, we are mindful of the predicament of the appellants if they were to proceed against the respondents under O 15 r 16 of the RHC for a declaratory judgment. In *Ahmad Jefri bin Mohd Jahri*, the appellant commenced a writ action against the respondents rather than an application for judicial review under O 53 of the RHC. The appellant had sought for a declaration that his dismissal by the respondents is void and of no effect and

A that he is still a government officer in the said Ministry. The writ and the statement of claim was struck out by the High Court on the ground that it was an abuse of process of the court. The appellant's appeal to the Court of Appeal was dismissed.

B **[18]** On appeal to the Federal Court, the order of striking out was affirmed. The Federal Court states, at p 172 (MLJ); 897 (CLJ):

> However, O 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, incorporating a declaration ... against a public authority for infringement of his rights to which he was entitled to be protected under public law, to follow. It is our view that where such an explicit procedure is created (as compared to the a general provision set-out under O 15 r 16 of the RHC) to cater for the purpose, then as a general rule all such application for such relief must commence according to what is set down in O 53 of the RHC, otherwise it is liable to be struck off for abusing the process of the court.

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D **[19]** Given the Federal Court decision, we find that the suggestion by the learned SFC that the appellants should seek declaratory relief against the respondents under O 15 r 16 of the RHC is not tenable.

E **[20]** On the objection raised by the learned SFC that the declarations sought for by the appellants concern future rights, we find guidance in the decision of the Federal Court in the case of *Datuk Syed Kechik*, where the appellant had applied for a declaration, among others that he is a person belonging to the State of Sabah in accordance with the Immigration Act 1959/63. The learned

F High Court judge in that case declined to grant the declaration sought on the ground that the application was premature and that the matter would be more appropriately dealt with under the special machinery provided by the Immigration Act. The appellant appealed to the Federal Court. In allowing the appeal the Federal Court states at p 108:

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> Indeed, we consider that a court should make it possible to settle real disputes immediately they arose, so that the parties may act with certainty and not be under the threat of legal uncertainty and should be able to discount the future.

H **[21]** In the instant appeal, the appellants are naturally threatened by the act of the respondents and the appellants are facing legal uncertainty insofar as all other publications are concerned. Applying the pronouncement of the Federal Court above, we find that it is appropriate for the appellants to apply for the order of declaration in respect of all other publications.

I **[22]** Finally, we take note that this appeal is in respect of an application for leave for judicial review where the threshold is very low. There is no necessity to go into the merits of the case at the leave stage. The test is to see whether the appellants had an arguable case and that the application is not frivolous (see

*Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927). We find that the appellant had passed the threshold, for leave to be granted.

**[23]** We therefore unanimously allow the appeal with no order as to costs. We set aside the decision of the High Court dated 5 May 2014. The case is remitted to the High Court for the High Court to hear the application in relation to the reliefs prayed for in prayer 2(c), (e), (g), (h), (i), (j), (k), (l), (m) (n) (o), (p), (q), (t), (u) and (v) at pp 70–77 of *rekod rayuan Jld* 1.

*Appeal allowed with no order as to costs.*

Reported by Afiq Mohamad Noor